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JOSEPH E. SPANIOLO, JR.
CLERK

(3)
No. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

BRIEF IN REPLY TO OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
(515) 472-5945

Counsel for Petitioner

July 21, 1988

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The Petitioner John E. Mallard
respectfully submits this reply brief in
response to arguments first raised in the
brief in opposition to the petition for
writ of certiorari filed by Respondent
United States District Court for the
Southern District of Iowa.

STATEMENT OF THE CASE¹

The Respondent incorrectly states that the Petitioner's application to the Eighth Circuit for a writ of mandamus "was filed in lieu of an interlocutory appeal in a case still pending in the District Court." Brief in Opposition, p. 4 (emphasis added). The petition for mandamus was not filed in lieu of an interlocutory appeal; the petition was filed because an interlocutory appeal was not available. Appendix to Brief in Opposition, p. 8a. Because an interlocutory appeal was not available, the District Court suggested to the Petitioner in a letter dated November 4,

¹The Statement of the Case in the Petition for Writ of Certiorari was kept brief in an effort to comply with Supreme Court Rule 21.1(g). In light of the Respondent's view of the importance of the procedural history of this case, however, the Petitioner now finds it necessary to supplement the Statement of the Case.

1987 (p. 1a, infra) that the Petitioner "could obtain appellate review of [the order denying the motion to dismiss the appointment of counsel] by a mandamus proceeding."

The Eighth Circuit denied the Petitioner's application for a writ of mandamus. Petition for Writ of Certiorari, 1a. Based upon the Petitioner's argument to the Eighth Circuit that there was substantial authority in support of the legal proposition that 28 U.S.C. Section 1915(d) does not authorize a court to require an unwilling attorney to represent an indigent person, however, the Eighth Circuit granted the Petitioner's application for a stay of District Court proceedings pending the disposition of Petitioner's application for a writ of certiorari. Appendix to this Reply Brief, p. 3a.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's holding was based upon its incorrect interpretation of 28 U.S.C. Section 1915(d) and not upon any finding that the petition for mandamus was premature or inappropriate.

The Respondent argues that the petition for mandamus was premature and inappropriate, and concludes that it was denied based on a finding that adequate alternative remedies existed, including an appeal from final judgment.² The Respondent fails to appreciate that if the Petitioner were compelled to undertake the representation of the indigent prisoners and continue to final judgment, the Petitioner would not have

²"Petitioner has failed to show any justification for deviation from the normal appellate process This petition for certiorari is simply premature." Brief in Opposition, p. 11.

an effective remedy in seeking the dismissal of his appointment. It is difficult to understand why the Respondent District Court makes this argument when its Chief Judge had suggested to the Petitioner in a letter dated November 4, 1987 (p. 1a, infra) that appellate review could be obtained by a mandamus proceeding.

In addition, the record of proceedings in the Eighth Circuit does not support the Respondent's assertion that the Eighth Circuit denied the petition for mandamus on the grounds that the Petitioner would have an opportunity to appeal a final judgment in the underlying action. In granting the Petitioner's application for a stay of District Court proceedings pending an application for a writ of certiorari (p. 3a, infra), the Eighth Circuit

recognized that its denial of the petition for mandamus constituted a substantive judgment with respect to the meaning of Section 1915(d), and that the Petitioner's only opportunity to obtain an effective remedy would be through a petition for a writ of certiorari.

II.

The Eighth Circuit's determination that 28 U.S.C. Section 1915(d) empowers a federal court to require an unwilling attorney to serve as counsel conflicts with decisions of other Circuits.

The Respondent asserts that the Eighth Circuit is not alone in its construction of Section 1915(d). This is incorrect. No case cited in the Brief in Opposition involves a ruling like the decision below which effectively holds that an unwilling attorney can be compelled to serve as counsel under Section 1915(d).

The Respondent cites Lewis v. Lane,

816 F.2d 1165 (7th Cir. 1987), as authority in support of the Eighth Circuit's interpretation of Section 1915(d). However, contrary to the Respondent's assertion that the Lewis case is "factually similar" to the instant case (Brief in Opposition, p. 8), the Lewis case involved an attorney who consented to accept an appointment under Section 1915(d). Lewis v. Lane, 816 F.2d 1165, 1168 (7th Cir. 1987). Furthermore, the Seventh Circuit in Lewis again acknowledged its interpretation of Section 1915(d) by stating that "the use of the word 'request' rather than 'appoint' suggests that the attorney's consent is required." Id. at 1168. See also Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) ("A court has the authority only to request an attorney to

represent an indigent, not to require him to do so") (emphasis in original).

III.

Supreme Court Rules 17 and 18 suggest that this petition should be granted.

Supreme Court Rule 17.1(a) provides that review on certiorari will be granted only when there are special and important reasons therefor, such as a conflict in decisions among Circuits. Contrary to the argument made by Respondent, the decision below conflicts with decisions of the Fifth, Sixth, Seventh, and Ninth Circuits. Petition for Writ of Certiorari, p. 8-13.

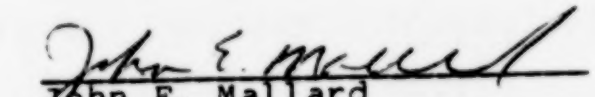
Supreme Court Rule 18 provides that review on certiorari before judgment will be allowed only when there is justification to deviate from normal appellate practice. Contrary to the Respondent's argument, the Petitioner's

only opportunity to obtain an effective remedy, i.e., a dismissal of his appointment, is by the petition for writ of certiorari, prior to being compelled to represent the indigent prisoners in the underlying action.

CONCLUSION

For these various reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,


John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Chambers of
HAROLD D. VIETOR
Chief Judge
United States Courthouse
East First and Walnut
Des Moines, Iowa 50309

November 4, 1987

John E. Mallard
Marcus & Mallard, P.C.
107 South Main Street
Fairfield, Iowa 52556

Re: Civil No. 87-317-B - Traman, et
al. v.
Parkin, et
al.

Dear Mr. Mallard:

My law clerk advises me that you
called to request that I make a
certification under 28 U.S.C. Section
1292(b) in connection with my ruling
denying your motion to dismiss your
appointment of counsel.

I believe there is substantial

ground for difference of opinion.
However, I cannot in good faith state that I believe that an immediate appeal from my ruling would materially advance the ultimate termination of the litigation, which would be Mr. Traman's litigation against the defendants. Therefore, I cannot in good conscience make a section 1292(b) certification.

Perhaps you could obtain appellate review of my order by a mandamus proceeding.

Sincerely,

/s/ Harold D. Vietor

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2583

In Re: John E. Mallard, *
Petitioner. * PETITION FOR
* WRIT OF
* MANDAMUS
*
*

Petitioner Mallard's application for a stay of district court proceedings in case No. 87-317-B, Mark Allen Traman, et al. v. Steve Parkin, et al., pending the disposition of an application for a writ of certiorari to the Supreme Court is granted.

February 8, 1988

A true copy.

ATTEST: /s/ Robert St. Vrain
CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT